Petition

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No. ...-...

IN THE

Supreme Court of the United States

October Term, 1981

JACK WILBUR TAVELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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QUESTIONS PRESENTED FOR REVIEW.

1. Denial of Due Process.

Whether the Due Process Clause of the Fifth Amendment is violated by the creation of a fictional criminal scenario which is created by government agents not acting in concert with the defendants, inviting the defendants to participate and then prosecuting them for conspiracy to violate the same criminal acts provoked, conceptualized and created by the agents.

2. Fifth Amendment.

Initially, whether the Petitioner's rights against self incrimination were violated by failure to advise the Petitioner of his *Miranda* rights when he had been targeted as a suspect and seized by objective standards.

Secondly, whether the Petitioner's Fifth Amendment rights were scrupulously honored when there was continued interrogation after unsuccessful attempts to garner counsel, but no waiver of rights was ever received.

3. Fourth Amendment.

Whether the seizure of the Petitioner rendered his preformal arrest statements inadmissible and violative of the Fourth Amendment.

Finally, whether the Petitioner's assertion of right to counsel and subsequent unsuccessful attempts to obtain counsel rendered his consent to search per se violative of the Fourth Amendment.

PARTIES.

On July 20, 1979, Steven Job and Petitioner, Jack Wilbur Tavelman were arrested for a violation of Section 846 of Title 21 of the United States Code and Section 1952 of Title 18 of the United States Code. Each was indicted and tried together. Their separate appeals in the United States Court of Appeals for the Ninth Circuit were consolidated for adjudication and determination.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION.

Petitioner, Jack Wilbur Tavelman (Defendant-Appellant below), prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, entered on July 13, 1981, as amended, September 25, 1981, and the Judgment of Conviction by the United States District Court, District of Nevada, entered on February 25, 1980.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming and vacating in part the judgment of the trial court is attached hereto in Appendix "A". Said

opinion is respectively entitled and found at *United States of America v. Tavelman*, 650 F.2d 1133 (1981).

On September 25, 1981 the court amended its opinion which is set forth herein in Appendix "B".

The opinion of the United States District Court for the District of Nevada denying Petitioner's motion to suppress evidence pursuant to Rule 41 of the Federal Rules of Criminal Procedure is attached as Appendix "C". The trial court's order denying Petitioner's motion pursuant to Section 3501 of Title 18 of the United States Code is attached hereto as Appendix "D".

JURISDICTION.

The opinion of the United States Court of Appeals for the Ninth Circuit, set forth in Appendices "A" and "B" was entered on July 13, 1981 and amended on September 25, 1981.

A Petition for Rehearing was denied on September 25, 1981. Said denial is set forth in Appendix "B".

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Fourth Amendment to the Constitution of the United States of America (Appendix "E").

Fifth Amendment to the Constitution of the United States of America (Appendix "F").

Section 1952 of Title 18 of the United States Code (Appendix "G").

Section 3501, Subsections (a) and (b) of Title 18 of the United States Code (Appendix "H").

Section 846 of Title 21 of the United States Code (Appendix "I").

STATEMENT OF THE CASE.

Baron, an inmate of the Douglas County, Nevada, Jail contacted Dennis Cameron of the Drug Enforcement Administration to assist the agency in apprehending persons involved in the distribution of narcotics in Los Angeles, California area. In July, 1979, Baron travelled to Los Angeles with a photograph showing several large bags of a substance giving the appearance of cocaine.

In Los Angeles, Baron, through Meekins, a middle man, met Silverman, another middle man. Baron told Silverman of a possibility of a source of cocaine in the Reno area. Over a period of four days, Silverman made a number of phone calls to Steven Job, trying to entice him into flying to Reno to purchase cocaine from Baron. After several desperate attempts, Silverman finally set up a meeting between Job and Baron at Job's house. Phone numbers were exchanged between Baron and Job, with Job still expressing reservations about purchasing cocaine from Baron.

On July 17, 1979 Baron called Job to discuss the possibility of doing business. No deal was set. On July 19, 1979, Baron made five phone calls to Job to negotiate a possible drug sale. All conversations were recorded by the D.E.A. where they originated.

At the end of their last taped conversation, Baron stated that he expected an apology for "all of this hassle" Job had caused him. In order to interest Job, Baron continually lowered the price and offered to pay for all of Job's expenses

in coming to Reno. Job mentioned that his friend "Jack" was to come with him to test the cocaine. "Jack" was described as an accountant.

Baron and Job met in the bar at the MGM Hotel in Reno, Nevada, where Baron showed Job two large bags each filled with five pounds of powder which appeared to be cocaine. Job had never even mentioned the possibility of purchasing ten pounds of cocaine. The briefcase with the powder was left with Baron's alleged partner, D.E.A. agent Cameron. Job and Baron went to Job's hotel room. After Baron saw $24,000 in cash in Job's room, the two returned to retrieve the briefcase. Baron and Job then proceeded to the elevator to go to Job's alleged partner's room and were followed by several D.E.A. agents.

Job and Baron got to the floor where his alleged partner was, and Job felt that something funny was going on. At this point he was arrested by agent Cameron. The people went to Job's room.

Cameron then attempted to locate Job's partner, "Jack the accountant," in the hotel. The hotel gave the agent information that the only single man checking in on the same day as Job and occupying a room on the floor where Job's partner was supposed to be was registered as "Jim Freeman" in room #2417. Cameron and the agents proceeded to that room.

Cameron knocked on the door and was allowed inside by Tavelman. In the hallway outside Tavelman's room were five individuals with at least three guns drawn visible to Tavelman when he opened the door to let Cameron in. Inside, Cameron explained that he suspected that there had been a narcotics arrest in the hotel that day in which he felt that Tavelman was involved. At this point the other agents entered and holstered their guns as they came into the room.

Cameron began to question Tavelman without reading him his *Miranda* rights and elicited that Tavelman was an accountant, had registered under a fictitious name, had $22,000 in cash in the room and had come into Reno on the same plane as Job. Cameron then asked for permission to search the room. Tavelman requested the opportunity to contact his attorney in Los Angeles. Cameron arrested Tavelman and read him his rights. Tavelman was then allowed to call his attorney but was unsuccessful after two attempts.

Discussions promptly began during which Tavelman refused to waive his rights and to allow a search of his room. Cameron indicated that any cooperation he gave would be made known to the U.S. Attorney and that he would simply get a warrant to search the room. On the third request to search the room, during the discussions with Tavelman, permission was given. Seizure of several items of evidence was had pursuant to this alleged consensual search. During the interrogation of Tavelman, gentle persuasion, promises of cooperation, availability of bail, threats of a search warrant, the possibility of Tavelman becoming an informant and other artifices were used to cajole Tavelman into damaging admissions and consent to search. At no time did Tavelman waive his rights nor did Cameron seek another reading of the rights or an explicit waiver from Tavelman.

On August 9, 1981 Tavelman, Petitioner herein, and Steven Job were indicted for a violation of Section 846 of Title 21 of the United States Code and Section 1952 of Title 18 of the United States Code.

On November 19 and 20, 1979, a hearing was held to determine admissibility of the items, both tangible and intangible, seized in Tavelman's room, pursuant to Fourth Amendment standards. Prior to trial, Petitioner moved for suppression of his statements in his room pursuant to Fifth

Amendment standards. Each motion was denied in its entirety, with no hearing being held on the motion pursuant to Section 3501 of Title 18 of the United States Code.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

DUE PROCESS IS DENIED WHEN THE POLICE CREATE A CRIME IN ORDER TO PROSECUTE THE DEFENDANTS.

This Court first dealt with the specific issue of entrapment in 1928 in the decision of *Casey v. United States*, 276 U.S. 413 (1928). The Court did not consider the argument of entrapment as it was not raised in the record. (*Id.* at 418-419). Justice Brandeis, in his dissenting opinion, though, recognized the problems of government conduct which created the crime itself.

> "The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the government; that the act for which the government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission.*The government may set decoys to entrap criminals. But it may not provoke or create a crime, and then punish the criminal, its creature.*" *Casey, supra* at 423, (Brandeis, J., dissenting) (emphasis added).

Nearly fifty years later this Court considered another situation involving coercive tactics by government agents in arresting and prosecuting the defendant. In *Hampton v. United States*, 425 U.S. 484 (1976) a government informant supplied the defendant with counterfeit drugs and then set up a sale of the drugs to government agents. This Court rejected the Defendant's violation of due process claims based upon *Russell v. United States*, 411 U.S. 423, 431-432 (1973), but held nevertheless:

> "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*. Here, as we have noted, the police, the government informer and the defendant acted in con-

> cert with one another. . . . If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Hampton, supra,* at 490 (emphasis in original).

The decision in *Hampton* arose as a response to the argument by the defendant that the government's conduct therein was . . .

> ". . . so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . ." *Russell, supra,* at 431-432.

Russell involved an entrapment argument based upon the act of government agents supplying an ingredient to the defendant to manufacture an illegal controlled substance, methamphetamine ("speed"). This Court upheld the decisions of *Sorrells v. United States,* 287 U.S. 435, 451 (1932) and *Sherman v. United States,* 356 U.S. 369, 372 (1958), which had mandated an investigation into the predisposition of the defendant prior to the government's involvement.

> "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. . . . On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." *Sherman, supra* at 372-373; quoting *Sorrells, supra,* at 451.

In *Sorrells,* a government agent visited the defendant's home, and asked repeatedly and persistently (three to five times) for some liquor. The defendant said he had no liquor,

but after continual requests, the defendant said he would try to get some. When he returned with the liquor, he was arrested. The Court found this governmental behavior a gross abuse of authority. 287 U.S. at 451.

In *Sherman*, the defendant was induced by the repeated requests of a government informer to supply him with narcotics. The defendant was unwilling from the beginning to do this, but, finally acquiesced, and was thereafter arrested. The Court held that entrapment was established as a matter of law. 356 U.S. at 373. The Court stated that entrapment occurred when the criminal conduct was the product of the creative activity of law enforcement officials. 356 U.S. at 372.

Rochin v. California, 342 U.S. 165 (1952), injected a requirement of basic fairness in criminal prosecutions. (*Id.* at 173). This Court disallowed convictions that were "... brought about by methods that 'offend a sense of justice.' " *Id.* at 173, quoting *Brown v. Mississippi*, 297 U.S. 278, 285, 286 (1936).

Therefore, as seen, the original entrapment theory espoused in *Casey, supra*, was injected with the Constitutional ramifications of the Due Process Clause of the Fifth Amendment as per *Rochin* and *Russell* and analyzed by *Hampton*.

In the instant case, though, the criminal activity was created by the government. The government agents, through their informer, conceptualized a scheme to sell phony drugs to the defendants. No illegal substances were involved, no purchase of narcotics by the defendants took place and no sale of controlled substances to anyone ever occurred. The defendants only involvement was unsuccessful negotiations and travelling to another state. The negotiations between the informant and the defendants were riddled with inducements and continual phone calls by the informer.

Here, the agents were not acting in concert with the defendants as in *Russell* and *Hampton*. The agents here committed the very acts feared by Justice Brandeis in *Casey* by provoking and creating crime and then inducing the defendants to enter the criminal scenario conceptualized by the agents. Without the government, no crime would have occurred.

This Court should distinguish between the conduct herein as opposed to the traps set in *Russell* and *Hampton*. The situation here was a fiction set up to arrest the defendants. The possibilities of abuse by the police are great if the due process clause is not invoked to prohibit this type of conduct. The police would be empowered to target suspected criminals for prosecution, create a fictional criminal scenario, induce interest in the targeted defendants and then prosecute them for conspiracy to participate in the fiction.

This Court, therefore, should accept the within matter to determine whether the Due Process Clause of the Fifth Amendment prohibits creation of a criminal scenario or fiction by government agents in order to prosecute suspected criminals regardless of their predisposition.

II.

ALL INCRIMINATING COMMUNICATIONS OBTAINED FROM PETITIONER WERE RECEIVED IN VIOLATION OF THE FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION.

A. The Receipt of Damaging Statements From the Petitioner Without Formal Arrest or Reading of the *Miranda* Rights Was Unconstitutional as Petitioner Was a Target Suspect and Objectively in Custody.

In the landmark decision, *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court stated:

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial

interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination. By custodial interrogation, we mean questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Id.* at 444). See also: *Lego v. Twomey*, 404 U.S. 477 (1972); *Doyle v. Ohio*, 426 U.S. 610 (1976); *Cf. Oregon v. Mathiason*, 429 U.S. 218 (1973).

In *Orozco v. Texas*, 394 U.S. 324 (1969), the defendant was accosted by four agents in his bedroom. Prior to giving *Miranda* warnings or formally arresting the defendant, the agents elicited several incriminating responses in order to establish probable cause. The Court rejected the argument that due to the defendant being in "familiar surroundings" and on his own bed, *Miranda* did not apply. (*Id.* at 326).

The statements of the defendant, in *Orozco*, were suppressed as there had been a deprivation of his freedom in a significant way. (*Id.* at 315).

Clearly, the instant matter involves one of a custodial interrogation where damaging statements were elicited and no *Miranda* rights were given. Prior to the *Miranda* rights being given, TAVELMAN was questioned by agent Cameron of the Drug Enforcement Administration, in the presence of at least four other individuals all standing near the suspect. The Petitioner had already seen the agents with guns, which were holstered as they entered the room. There can be no doubt that TAVELMAN'S freedom was restricted significantly. The agents acted in a manner much beyond a simple investigatory stop or inquiry. Agent Cameron had gone so far as indicating to TAVELMAN that he was involved in an arrest that had already taken place in the hotel that day. The trickery involved in not informing the defen-

dant of his rights and asking him statements that only Cameron knew would incriminate TAVELMAN is obvious. Each question was innocuous in and of itself, but of a highly incriminating nature when coupled with the information known already by Cameron. Formal arrest and a reading of the *Miranda* rights came only when the agent asked for permission to search, and the Petitioner himself suggested the need for an attorney.

Although TAVELMAN had not been formally arrested, he was in a custodial situation where his freedom was significantly deprived. As stated in *Miranda*:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. . . . But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda, supra,* at 479. See also: *Edwards v. Arizona,* ... U.S. ..., 68 L.Ed.2d 378, 101 S.Ct. ... (1981).

Therefore, Petitioner was a target suspect when the agents entered the Petitioner's room and utilized the specific knowledge gained before formal arrest to convict the Petitioner, without providing the necessary required safeguards to the defendant's rights, while the defendant was in a custodial atmosphere.

B. The Government Agents Did Not Scrupulously Honor the Petitioner's Fifth Amendment Rights and Coerced Further Damaging Admissions After Formal Arrest.

Michigan v. Mosley, 423 U.S. 96 (1975), dealt with the admissibility of a confession garnered when the defendant refused to waive his rights during his first interrogation, but did confess to a second officer questioning him about an unrelated crime after advising the defendant a second time of his *Miranda* rights. The Court held that the confession was admissible but instructed on the limitations and procedures for interrogations by law enforcement personnel.

> "We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on *whether his 'right to cut off questioning' was 'scrupulously honored.'* " *Id.* at 104, quoting *Miranda, supra*, at 479. (emphasis added).

Part of the problem in dealing with the "scrupulously honored" test is what can be considered questioning or interrogation. This Court recently resolved the issue as to what an interrogation is when it was held:

> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, ... U.S. ..., 64 L.Ed.2d 297, 307-308 (1980).

The basis for the *Innis* definition of interrogation was to provide an extra protection to the defendant under *Miranda* against coercive police tactics. (*Id.* at 308). Clearly, if

rights are not waived and a desire for counsel is shown, the burden on the government to show waiver is heavy.

In the instant case, Petitioner was coerced through many tactics. Initially the Petitioner asserted his right to an attorney before the *Miranda* rights were given. After having been read his rights, Tavelman tried twice to contact his attorney without success. Tavelman who never waived his rights, was continuously requested to waive his Fourth Amendment rights. During this questioning, promises of leniency were brought up as well as cooperation with the agents and possible freedom. The agent further discussed with Tavelman the possibility of jail and spending the weekend there without bail. In all this confusion, not an advocate for his defense and the unavailability of an attorney, Tavelman even asked to talk off the record when Cameron interrogated him.

In *Edwards v. Arizona*, ... U.S. ..., 68 L.Ed.2d 378 (1981), this Court held:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." (68 L.Ed.2d at 386).

Edwards found that the continued questioning to be a per se violation of *Miranda* when right to counsel has been invoked. (68 L.Ed.2d at 386-387). The officers herein did not "scrupulously honor" the Petitioner's rights. The defendant's understanding of his rights (see *United States v. Tavelman*, 650 F.2d 1133, 1138 (1981)) is not the benchmark, intelligent waiver is. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Therefore, Tavelman's incriminating statements and assertive conduct should be suppressed as he was coerced and

cajoled by subtle means. He was questioned through tactics designed to elicit incriminating responses, and, finally, his Fifth Amendment rights were not scrupulously honored, especially his right to counsel.

This Court should review the instant matter to determine the proper procedures when the police maintain interrogation after rights have been given, an attorney is requested and further discussions ensue, without a specific waiver or provision of an attorney.[1]

III.

PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT WERE VIOLATED BY ALTERNATIVELY A SEIZURE OF THE DEFENDANT WITHOUT PROBABLE CAUSE AND GARNERING CONSENT TO SEARCH AFTER REQUEST FOR AN ATTORNEY.

A. There Was No Probable Cause for the Initial Seizure of the Petitioner.

Probable cause exists when there are:

> ". . . facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstance shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillipo*, 443 U.S. 31, 37 (1979). See also: *Carroll v. United States*, 267 U.S. 132 (1925).

Clearly, arrests of suspects can only occur when probable cause exists. *Dunaway v. New York*, 442 U.S. 200, 207-209 (1979).

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[1]The trial court refused to hold a voluntariness hearing pursuant to 18 U.S.C. § 3501 although timely requested. See *Jackson v. Denno*, 378 U.S. 368 (1964). The trial court's decision pursuant to defendant's motion pursuant to Federal Rules of Criminal Procedure Rule 41 only dealt with Fifth Amendment issues not raised at the suppression hearing held pursuant to Fourth Amendment standards. In essence, no decision was made on the issues presented.

The key to determining when probable cause is needed, is to analyze when the actual arrest occurred. *Henry v. United States*, 361 U.S. 98, 103 (1959).

> "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

In *Dunaway v. New York, supra*, the defendant was "seized" but not arrested. After his interview with the police, which elicited incriminating statements, the defendant was arrested. This Court disapproved the arrest. (*Id.* at 212-213). See also: *Brown v. Illinois*, 422 U.S. 590 (1975).

In the instant case, the government agents entered the Petitioner's room without probable cause. The agents knew only speculative facts regarding the Petitioner. Once in his hotel room, the agent began to question Tavelman regarding status, identification, employment, cash on hand and other incriminating matters. In essence, Cameron was attempting to elicit incriminating information without the benefit of having read Tavelman *Miranda* warnings and to "roll" the situation into probable cause. Finally, arrest was made only when the Petitioner asserted his rights.

Essentially, Tavelman and his hotel room were controlled by government agents rather than by the occupant. Tavelman had already seen at least three guns in the air.

Once an arrest has occurred without probable cause, the arrest must be quashed as well as all evidence received as a fruit of that illegality. *Wong Sun v. United States*, 371 U.S. 471, 485, 491-492 (1963); *United States v. Crews*, ... U.S. ..., 100 S.Ct. 1244, 1249-1250 (1980).

Herein, each of the items of evidence produced in Tavelman's room, as well as his incriminating statements and questionable consent to search his room should be suppressed.

B. Petitioner's Consent to Search His Hotel Room Was Involuntary and Violative of His Assertion to a Right to Counsel.

In analyzing a warrantless search based upon consent, the basic issue to be determined is voluntariness.

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968).

The Court must use the basic test of "totality of the circumstances" in ruling on the voluntariness of consent.

> ". . . [T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Since consent is a waiver of a Constitutional right it cannot be inferred lightly. *Zap v. United States*, 328 U.S. 624 (1964); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

> "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth, supra* at 229.

In the instant situation, Petitioner was faced with five individuals and drawn guns, continued questioning over a long period of time, with several agents in his hotel room near him during the questioning. Continued questioning of Tavelman produced from the government not only recurrent,

gratuitous and deceitful promises of leniency; but also at least three requests to search his room, coupled with threats of a search warrant. The requests to search the room were made after a refusal to waive his *Miranda* rights and attempts to reach an attorney.

This court should accept the within matter to determine initially, the problems surrounding a consent to search when coercive promises of leniency are made in return for consent to search. Further, whether the defendant is entitled to counsel when requested prior to the alleged consensual search and, alternatively, whether request for consent to search is per se a violation of the defendant's rights after counsel has been requested. See *Edwards v. Arizona, supra; People v. Johnson*, 48 N.Y.2d 565, 399 N.E.2d 936 (1979).

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PHILIP M. SCHREIBER,
of Counsel to
Law Offices of
ANDREW M. ZANGER,
Attorneys for Petitioner,
Jack Wilbur Tavelman.

APPENDIX A.

Decision of the United States Court of Appeals for the Ninth Circuit Rendered July 13, 1981.

United States of America Plaintiff-Appellee, v. Jack Wilbur Tavelman, Defendant-Appellant.

United States of American, Plaintiff-Appellee, v. Steven Job, Defendant-Appellant. Nos. 80-1128, 80-1129.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 9, 1981. Decided July 13, 1981.

Appeals from the United States District Court for the District of Nevada.

Before SKOPIL and FARRIS, Circuit Judges, and BELLONI,* District Judge.

FARRIS, Circuit Judge:

Jack Wilbur Tavelman and Steven Job appeal their convictions and sentences for violation of 21 U.S.C. §§ 841(a)(1), 846 (1976) (conspiracy to possess cocaine with intent to distribute) and of 18 U.S.C. § 1952(a)(3) (1976) (Travel Act) (interstate travel with acts in furtherance of intent to distribute cocaine). *See* 28 U.S.C. § 1291 (1976). We affirm *except* the imposition of special parole terms under 21 U.S.C. § 846 (1976), which we vacate.

I. FACTS

Baron, an inmate at the Douglas County Jail, contacted DEA agent Cameron who accepted Baron's offer to assist the agency in apprehending persons involved in the distribution of narcotics in Los Angeles. When Baron went to Los Angeles in July, 1979, he took a photograph showing

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*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

him holding several large bags filled with white powder giving the appearance of cocaine (but actually procaine). Through one Meekins, a middle man, Baron met Silverman, another middle man. Over a period of four days, Silverman made a number of calls to defendant Job, attempting to entice him to fly to Reno to purchase some very good cocaine from a large dealer.[1] During a subsequent meeting at Job's house, Baron and Job discussed the quality and price of the cocaine and exchanged telephone numbers. During this conversation, Job expressed reservations about the proposed purchase because he already had one kilo of cocaine that he was attempting to sell. After three of four days in Los Angeles, Baron returned to Reno and reported that Job was not interested in purchasing cocaine. Over the next few days, however, Baron made six recorded telephone calls from the Reno DEA office to Job in Los Angeles in which he increased the attractiveness of the trip to Reno. In his acceptance, Job mentioned that his friend Jack, an accountant, would travel with him to Reno to analyze the cocaine and would supply half the purchase money.

Job and Tavelman flew to Reno from Los Angeles on July 20, 1979 on Western Airlines flight #144. Baron and Job met in the bar of the MGM Grand Hotel. Baron opened his brief case an inch or so to display two plastic 5-lb. bags of powder appearing to be cocaine. Job then took Baron to his room to show him $24,000 in cash, indicating that his

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[1]During trial, Silverman testified over objection to a prior transaction occurring between himself, Tonkowicz ("Tea Bags"), and Job one month before the arrests. Silverman and Tonkowicz had encountered one another at a mutual friend's home. When Tonkowicz showed Silverman a pound of cocaine he had for sale, Silverman telephoned Job and went to Job's home with a small sample. Several days later, Silverman and Tonkowicz returned to Job's home where Job gave Tonkowicz approximately $27,000. Another person at Job's home, identified by Silverman as Tavelman, had gone to the back of the house before the exchange of money.

friend had the other half of the purchase money in a room on the floor above. Job said that a cocaine laboratory had been set up in the bathroom of his friend's room. Baron and Job returned to the bar, where Baron retrieved his suitcase from Cameron, an alleged compatriot. They then went to the elevator, to go to Job's friend's room to test the cocaine. Several DEA agents got on the elevator with Baron and Job, including Cameron. On leaving the elevator and starting down the hallway, Job asked Baron if he was alone. Cameron, who had left the elevator on the same floor, then arrested Job. Job requested that they return to his room. A pouch containing money was seized and opened when the group returned to Job's room. An airline ticket which fell out of Job's coat was also seized. Approximately $1,000 was taken from Job's person.

Following Job's arrest, agent Cameron attempted to locate Job's partner, "Jack the accountant." The hotel management provided information that the only single man checking in on the same day as Job and occupying a room on the floor above was registered as "Jim Freeman" and was located in room #2417. Cameron proceeded to that room, identified himself to Tavelman as a DEA agent investigating a narcotics arrest occurring earlier, and asked to be admitted. Tavelman admitted Cameron, who was accompanied by four other agents, to the room. In response to Cameron's questions, Tavelman admitted that he was an accountant, had registered under a false name, had $22,000 cash in the room, and had traveled from Los Angeles on the flight known by the agents to have been Job's. Tavelman denied knowledge of or involvement in the narcotics deal under investigation. Tavelman refused Cameron's request to search his bathroom and requested consultation with an attorney. Cameron then arrested Tavelman and read him the *Miranda* warnings. Tavelman's attempts to contact his at-

torney were unsuccessful. After arrest, Tavelman consented to the search. He took Cameron into the bathroom, where a cocaine laboratory was found. He also produced a purse with money in it and some cocaine. Cameron later testified at trial that, during this time, Tavelman had told him that if the cocaine tested out, "they were going to use the money to buy the coke." Later, Job and Tavelman met in the hallway of the DEA office. Job said, "Jack, I see they got you, too. I just want you to know that they didn't get you through me." Tavelman directed his response to Cameron. The parties disagreed on that response: He asked either "How did you get me?" or "How did you get that?"

On August 9, 1979, Tavelman and Job were indicted in the District of Nevada (1) for conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1976) and (2) for interstate travel with intent to distribute cocaine toward which end acts were consummated in violation of 18 U.S.C. § 1952(a)(3) (1976).

Tavelman's and Job's pretrial motions to dismiss under Fed.R.Crim.P. 12(b) were denied in their entirety. Tavelman's motion to suppress evidence obtained from his hotel room, including his statements at that time, was denied in its entirety. At the same pretrial hearing, Job's motion to suppress the pouch and money seized from his hotel room was granted and his motion to suppress the airline ticket was denied. Tavelman's pretrial motion for a hearing to determine the admissibility of confessions, admissions, and assertive conduct, *see* 18 U.S.C. § 3501 (1976) (motion in limine), was also denied.

A three-day jury trial, commencing on January 16, 1980, resulted in convictions of both defendants on both counts of the indictment. At trial defendants renewed their motions to suppress the statements made by Tavelman in his hotel

room regarding the intended use of the money and by Job and Tavelman in the DEA office. The court ruled that Tavelman's statement in the hotel room would be excluded and that Job's and Tavelman's statements in the DEA office would be used only against the codefendant who made them. Later, the court ordered the defendants' statements at the DEA office stricken from the record and admonished the jury to disregard them. Defendants' motions for acquittal at the end of the prosecution's case were denied. The motions for acquittal were converted into motions for mistrial under *Bruton* from the three extrajudicial statements of the defendants. The court denied the mistrial motions but admonished the jury.

On February 25, 1980, Tavelman was sentenced to a five-year term on Count I with a special parole term of three years under 21 U.S.C. § 960 (1976) and to a two-year term, to run concurrently with that on Count I, and a $5,000 fine on Count II. Job was sentenced on the same day to an eight-year term on Count I with a special parole term of three years under 21 U.S.C. § 960 (1976) and to a four-year term, to run consecutively with that on Count I, on Count II.

II. SUFFICIENCY OF THE INDICTMENTS

[1] An indictment must inform the defendant of "the nature and cause of the accusation." U.S.Const. amend. VI. *Accord,* Fed.R.Crim.P. 7(c)(1); *United States v. Cecil,* 608 F.2d 1294, 1296 (9th Cir. 1979) (per curiam). An indictment which tracks the offense in the words of the statute is sufficient if those words fully, directly, and expressly set forth all the elements necessary to constitute the offense intended to be proved. *Hamling v. United States,* 418 U.S. 87, 117 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). The indictments of Tavelman and Job contained the specific dates of their alleged criminal violations, the stat-

utory provisions under which the indictments issued, and brief descriptions in statutory terms of the nature of the criminal activity alleged.

A. Count I

Count I of the indictments alleged that Tavelman and Job conspired, between July 12 and July 20, 1979 to possess cocaine with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1), 846 (1976). Job and Tavelman contend that, although the existence of a substantive count may substitute for a definite statement of essential facts or overt acts, their indictments failed either to contain a substantive count or to allege essential facts or overt acts and were therefore constitutionally defective.

[2-4] An indictment under 21 U.S.C. § 846 (1976) is sufficient if it alleges:

> a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, even if it fails to allege or prove any specific overt act in furtherance of the conspiracy.

United States v. Marable, 578 F.2d 151, 154 (5th Cir. 1978), *overruled on other grounds, United States v. Rodriguez*, 612 F.2d 906, 919 & n.35 (5th Cir.) (en banc) (by implication), *cert. denied*, —— U.S. ———, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980). Courts do not require as detailed a statement of an offense's elements under a conspiracy count as under a substantive count. *E. g., Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 301 71 L.Ed. 545 (1927); *United States v. Pheaster*, 544 F.2d 353, 360-61 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977). *United States v. Cecil*, 608 F.2d 1294, 1296-97 (9th Cir. 1979) (per curiam), on which

defendants rely, is inapposite. The indictment in *Cecil* did not place the conspiracies in any time frame whatsoever. The Count I indictments were adequate.

B. Count II

Count II of the indictments contained allegations that the defendants, on or about July 20, 1979, traveled from Los Angeles to Reno with intent to promote the unlawful activity of possession with intent to distribute cocaine (in violation of 21 U.S.C. § 841(a)(1) (1976)) and that, on that same day, they committed acts facilitating that unlawful activity in violation of 18 U.S.C. § 1952(a)(3) (1976). Job and Tavelman contend that their indictments under Count II were fatally defective because they failed to allege any specific overt acts committed in furtherance of the unlawful intent.

[5, 6] An indictment under the Travel Act requires allegations of each of the three elements of the crime: (1) interstate commerce or use of an interstate facility (2) with intent to promote an unlawful activity and (3) a subsequent overt act in furtherance of that unlawful activity. *See, e. g., United States v. Wander,* 601 F.2d 1251, 1258 (3d Cir. 1979); *United States v. Polizzi,* 500 F.2d 856, 897 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). The indictments alleged that on July 20, 1979: (1) the defendants traveled interstate (between Los Angeles and Reno); (2) with the intent to promote a violation of 21 U.S.C. § 841(a)(1) (specifically the possession of cocaine with intent to distribute); and (3) thereafter knowingly performed acts facilitating that unlawful activity. These allegations are sufficient to state violations of 18 U.S.C. § 1952(a)(3). We reject the defendants' contentions.

III. SEARCHES OF THE HOTEL ROOMS

A. The Search of Job's Room

Job concedes that he requested, after his arrest in the hallway, that he and the agents return to his hotel room. He contends, however, that he did not consent to a search of his room and that the search was not supported by probable cause.

[7] Upon conflicting evidence, the trial court found that Job had consented to the agents' entry into his room and that the airline ticket was in "plain view" when it was seized, *see generally Coolidge v. New Hampshire*, 403 U.S. 443, 464-71, 91 S.Ct. 2022, 2037-40, 29 L.Ed.2d 564 (1971). The record supports that finding. It is not clearly erroneous. *See United States v. Page*, 302 F.2d 81, 85 (9th Cir. 1962) (en banc) (standard of review for admissibility of evidence).

B. The Search of Tavelman's Room

[8] Tavelman contends that, because the agents' entry into his room was without probable cause, the evidence obtained there should have been suppressed under the Fourth Amendment. We understand but reject the argument. The court could properly find from the record that Tavelman consented to the agents' entry into his hotel room and to their search.

[9] "[W]hether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973). A finding of consent by the trial judge should be reversed only if, viewing the evidence in the light most favorable to the government, this court concludes that

it is clearly erroneous. *United States v. Wasserteil*, 641 F.2d 704 at 707 (9th Cir. 1981) (quoting *United States v. O'Looney*, 544 F.2d 385, 388 (9th Cir.), *cert. denied*, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976)).

[10] Here, Tavelman gave indicia of consent when Cameron came to his hotel room door and asked to be admitted to question him about a recent narcotics arrest. Tavelman's election to contact his attorney at a time during the interview when he may have reasonably suspected that the investigation was focusing on him demonstrated an understanding of his *Miranda* rights. The burden is on Tavelman to show that the finding of consent was clearly erroneous. *See, e. g., United States v. Townsend*, 510 F.2d 1145, 1147 (9th Cir. 1975) (per curiam). He fails to carry that burden.

IV. ADMISSIBILITY OF CODEFENDANTS' STATEMENTS

[11] Both defendants contend that the admission of their three extrajudicial statements violated their Sixth Amendment right to confrontation as articulated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). These three statements, which were admitted into evidence at trial, were later ordered stricken from the record by the district judge who then admonished the jury to disregard them.

Cases subsequent to *Bruton* have distinguished — as admissible — a codefendant's admission which is a vague reference from which guilt might be inferred from other facts and evidence. *See, e. g., United States v. Belle*, 593 F.2d 487 493-96 (3d Cir.) (en banc), *cert. denied*, 442 U.S. 911, 99 S.Ct. 2825, 61 L.Ed.2d 277 (1979); *United States v. Wingate*, 520 F.2d 309, 313-14 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074, 96 S.Ct. 858, 47 L.Ed.2d 84

(1976). Although the statements admitted here did serve to tie Tavelman and Job to one another in the crime, they were not incriminating without reference to other, admissible evidence. Further, even if there was *Bruton* error, it was harmless beyond a reasonable doubt, *see United States v. Longee*, 603 F.2d 1342, 1345 (9th Cir. 1979), in light of the nature of the statements, the striking of the statements and instructions by the court, and the overwhelming admissible evidence that also tied the defendants to one another. That other admissible evidence included Silverman's testimony about the cocaine purchase by Job a month earlier during which Tavelman was present; the identical Western Airlines' flight from Los Angeles to Reno (on which the defendants occupied firstclass seats # #4A and 4C); Job's statements and conduct at the hotel indicating the floor on which his friend was located; Tavelman's admission that he was an accountant, as Job had said, and from Los Angeles; And the cocaine laboratory found, as Job said it would be, in the bathroom of Tavelman's room. *See United States v. Buckner*, 610 F.2d 570, 574-75 (9th Cir. 1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1646, 64 L.Ed.2d 235 (1980).

V. ENTRAPMENT AND DUE PROCESS CHALLENGES

[12-14] Both defendants contend that the government's role in "originating, conceptualizing, and engineering the entire plan" was entrapment. The defendants' entrapment defense fails factually because of the evidence adduced at trial. Government conduct which originates the criminal design and implants it in the mind of an innocent or unwilling defendant is entrapment. *Sherman v. United States*, 356 U.S. 369, 371-73, 78 S.Ct. 819, 820-21, 2 L.Ed.2d 848 (1958). To determine whether the government has im-

planted a criminal design in the mind of an otherwise innocent defendant, the court considers:

> the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government.

United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926, 98 S.Ct. 2820, 56 L.Ed.2d 769 (1978). The record supports the finding that there was no entrapment.

[15] Alternatively, the defendants argue that the government's conduct in "originating, conceptualizing, and engineering the entire plan" was so shocking that it should offend the court's "sense of justice." The Third Circuit has held that outrageous and overreaching police involvement invalidated a conviction despite a showing of the defendant's predisposition. *See United States v. Twigg*, 588 F.2d 373, 378-80 (3d Cir. 1978). *See also United States v. Borum*, 584 F.2d 424 427-30 (D.C.Cir.1978). Although the record provides a basis for defendants' argument, it also satisfies us that the conduct complained of here does not reach that extreme area in which it is "outrageous" or "grossly shocking". *See United States v. McQuin*, 612 F.2d 1193, 1196 (9th Cir.), *cert. denied*, 445 U.S. 955, 100 S.Ct. 1608, 63 L.Ed.2d 791 (1980); *United States v. Smith*, 538 F.2d 1359, 1361-62 (9th Cir. 1976).

VI. SUFFICIENCY OF THE TRAVEL ACT EVIDENCE

Defendants contend that the Travel Act contemplates convictions only for a continuous course of criminal conduct in interstate commerce and that such a continuous course

was not shown by the evidence. Defendants rely primarily on *United States v. Donaway*, 447 F.2d 940 (9th Cir. 1971). In *Donaway*, a Ninth Circuit panel found the placing of one bet to be a "sporadic casual involvement" in, rather than a "continuous course" of, criminal activity proscribed by the Travel Act. *Id.* at 944.

[16-19] Neither evidence of large-scale operations nor long-term duration is required to support a Travel Act conviction. *United States v. Cozzetti*, 441 F.2d 344, 348 (9th Cir. 1971). Instead, what must be shown is evidence of a continuous enterprise and one act in interstate commerce in furtherance of that enterprise. *See United States v. Teemer*, 214 F.Supp. 952, 958 (N.D.W.Va.1963). Considering the quantity of cocaine involved in the prior transaction proved at trial, the jury could reasonably find a continuous course of criminal activity. Viewing the evidence in the light most favorable to the verdict, we do not find clear error. *See United States v. Anderson*, 642 F.2d 281 at 284 (9th Cir. 1981). The defendants also contend that the evidence did not show a "continuous" use of interstate facilities. The statute does not, however, require such proof. Once a showing of a continuous enterprise is made, a showing of one transaction in interstate commerce is sufficient to sustain a conviction under section 1952(a). *See, e. g., United States v. Teemer*, 214 F.Supp. at 958. We reject the defendants' contention.

VII. PROPRIETY OF SENTENCES AND SPECIAL PAROLE TERMS

A. Job's Sentence

Job contends first that he was incorrectly sentenced under 21 U.S.C. § 960 (1976), rather than under 21 U.S.C. § 846 (1976), on Count I. We reject the contention. He was not

sentenced under 21 U.S.C. § 960 (1976), but only given a special parole term under that provision.

[20-22] Job also contends that his consecutive sentences were illegally imposed because they arose from a single transaction and identical facts and because a conspiracy is not an offense punishable separately from one under the Travel Act. *See Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1293 n.17, 43 L.Ed.2d 616 (1975); *United States v. Kearney*, 560 F.2d 1358, 1365-67 (9th Cir.), *cert. denied*, 434 U.S. 971, 98 S.Ct. 522, 54 L.Ed.2d 460 (1977). Proof of a violation of 21 U.S.C. § 846 requires showing the elements of (1) an agreement to violate the statute (2) with intent to commit the underlying substantive offense and (3) a subsequent overt act in furtherance of that agreement. *E. g., United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980). Proof of a violation of 18 U.S.C. §1952 requires showing the elements of (1) interstate travel or use of an interstate facility (2) with intent to promote an unlawful activity and (3) an overt act in furtherance of the unlawful activity. *United States v. Wander*, 601 F.2d 1251, 1258 (3d Cir. 1979). The interstate element of section 1952 is not required under section 846 and the agreement element of section 846 is not required under section 1952. In the special context of narcotics offenses, we have recently held that convictions for conspiracy and the substantive offense under 21 U.S.C. §§ 841(a)(1), 846 (1976) are permissible. *United States v. Wylie* 625 F.2d 1371, 1381 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981). By analogy from *Wylie*, we uphold the convictions for conspiracy and Travel Act violations. *See United States v. Stevens*, 612 F.2d 1226, 1231 (10th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980).

B. Both Defendants' Special Parole Terms

[23] Job argues, and the government concedes, that the special parole terms imposed on both defendants under 21 U.S.C. § 846 (Count I) are improper under *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). In *Bifulco*, the Supreme Court held that section 846 does not authorize the sentencing court to impose a special parole term[2] on a defendant convicted of conspiracy to manufacture or distribute a controlled substance. *Id.* at 400-01, 100 S.Ct. at 2259. We therefore vacate the special parole terms imposed on both defendants.

Affirmed in part and vacated in part.

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[2]A "special parole term" is a term of two years' minimum imposed in addition to a term of imprisonment: If the special parole is violated, the original term of imprisonment may be increased by the period of the special parole term. *See* 21 U.S.C. § 841(b)(1)(B) (1976 & Supp. II 1978); *Bifulco*, 447 U.S. at 384-85, 100 S.Ct. at 2250-51.

APPENDIX B.

Order of the United States Court of Appeals for the Ninth Circuit Rendered September 25, 1981.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Jack Wilbur Tavelman, Defendant-Appellant.

United States of America, Plaintiff-Appellee, v. Steven Job, Defendant-Appellant. Nos. 80-1128, 80-1129.

Filed: September 25, 1981.

Before: SKOPIL and FARRIS, Circuit Judges, and BELLONI,* District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing of appellants Tavelman and Job. Judge Skopil and Judge Farris have voted to reject appellant Job's suggestion for rehearing en banc.

The opinion filed July 13, 1981 shall be amended as follows: Add the following paragraph after the first full paragraph on page 3548 of the slip opinion.

> Nor are Tavelman's Fifth Amendment objections compelling. Even if he preserved them on the record, the district court's determination that Tavelman was not in custody prior to his formal arrest was not clearly erroneous.

The full court has been advised of the proposal to amend the opinion, and of appellant Job's suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

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*Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

The petitions for rehearing are denied and appellant Job's suggestion for rehearing en banc is rejected. The opinion filed July 13, 1981 is amended as set forth above.

APPENDIX C.

Order of the Trial Court Rendered December 12, 1979.

In the United States District Court for the District of Nevada.

United States of America, Plaintiff, vs. Jack Wilburn Tavelman, Steven Job and Sheldon Scott Silverman, Defendants. CR-R-79-39-ECR.

Filed: December 12, 1979.

The Motion of defendant Jack Wilburn Tavelman, hereinafter referred to as "Tavelman", for Return of Seized Property and the Suppression of Evidence, filed herein on October 2, 1979, came on for hearing before this Court on November 19 and 20, 1979. The Court heard testimony and received other evidence, and considered the argument of counsel.

On July 20, 1979, defendant Job was arrested in the M.G.M. Grand Hotel, Reno, Nevada, on a narcotics charge. Drug Enforcement Administration agent Dennis Cameron, at least two either agents and a hotel security officer then went to a suite on the 24th floor where it was believed an accomplice of Job was staying. They were armed. Tavelman answered Cameron's knock on the door. Cameron identified himself and showed his credentials as a DEA agent. He told Tavelman that the latter's suite number had come up during a drug arrest on a lower floor of the Hotel, and asked to discuss the matter. Tavelman invited Cameron into the suite. Cameron then asked permission for the other agents in the hallway to come into the suite, and permission was granted by Tavelman.

Agent Cameron asked for identification, and Tavelman produced his passport and driver's license. Upon being told that Tavelman had flown into Reno from Los Angeles, Cameron asked to see the airline ticket. Tavelman produced

a Western Airlines ticket. Upon being asked if he had a large sum of money with him, Tavelman acknowledged having approximately $22,000, which he said he had brought for gambling purposes.

Next, agent Cameron told Tavelman that a cocaine testing laboratory was supposed to be in the bathroom of the suite of the person suspected of being involved in the drug incident that had led to the arrest on the lower floor of the Hotel. Cameron asked whether Tavelman's bathroom could be searched.

Tavelman responded in the negative, saying that the matter was too serious for him to cope with alone. He said that he needed an attorney. Cameron said that was okay, for he would just get a search warrant. Then he placed Tavelman under arrest for conspiring to possess and distribute cocaine. The Miranda warnings were read.

Tavelman attempted to reach his Los Angeles area attorney by telephone, but was unsuccessful. He also was unable to reach that attorney's associate by phone. Then he called Cameron to the living room area, out of earshot of the other agents, and asked whether his problems might be mitigated if he cooperated. Cameron answered that any cooperation would be made known to the U.S. Attorney.

Then Tavelman declared that he was being treated like a gentleman, therefore he would show the agents what they were looking for. He opened the door to the bathroom and led the agents in. There, he pointed out a cocaine testing laboratory. Tavelman then went to the bedroom and picked up a pouch containing the money. He turned it over to an agent. Three small vials of cocaine were also produced by Tavelman, as well as a puzzle book with one page missing.

At Tavelman's request, Cameron allowed him to call room service and order a steak. Tavelman ate the steak and

took two drinks of scotch before being transported to DEA's Reno headquarters.

The primary issue here involved is whether Tavelman waived his right to consult with an attorney, after first declaring that he felt he needed one and twice trying unsuccessfully to reach one by telephone. Discussion of this issue necessarily starts with the case *Miranda v. Arizona*, 384 U.S. 436 (1966). The case holds that the prosecution may not use any statements stemming from custodial interrogation of a defendant unless the prosecution shows it used procedural safeguards effective to secure the privilege against self-incrimination. "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id., at 444. Statements made by a person during interrogation that is not custodial (e.g., investigational), are not excludable under the Miranda rule. *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978).

The Miranda rule as concerns a defendant's request for an attorney is as follows (384 U.S. 474):

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
>
> "If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth

Amendment privilege so long as they do not question him during that time."

The Miranda rule is concerned with the Fifth Amendment privilege against self-incrimination. The opinion declares that the failure to honor a defendant's request for an attorney undermines the exercise of that privilege (either to remain silent or to speak without intimidation). Thus, the presence of an attorney during such interrogation protects the defendant's rights subsequently at trial by enhancing the integrity of the fact-finding processes in court. Further, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *Fare v. Michael C.*, 99 S. Ct. 2560 (1979).

After the defendant has elected to exercise his right to counsel, the interview must be terminated as to that person's guilt or innocence, but may be continued as to other matters. *Miranda*, supra, at p. 485. If the person is indecisive in his request for counsel, the interviewing law enforcement agent must exercise his own judgment in determining whether the right to counsel is being exercised or waived. The standard for waiver is necessarily high, however. Id., at pp.485-486. Further questioning by the agent directed only to clarification of the defendant's wishes is not forbidden. *Pierce v. Cardwell*, 572 F.2d 1339 (9th Cir. 1978); *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979).

Subsequent to the giving of the Miranda warnings and the defendant being given the opportunity to exercise his rights thereunder, the defendant. . ."may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Miranda*, at 436 U.S. 479. The right to waive has been recognized consistently as to the defendant's entitlement to counsel. See *Brewer v. Williams*, 430 U.S. 387 (1977); *United States v. Rose*, 570 F.2d 1358

(9th Cir. 1978). Moreover, such waiver may be implied, rather than express. *North Carolina v. Butler*, 99 S.Ct. 1755 (1979); *Pierce v. Cardwell*, 572 F.2d 1339 (9th Cir. 1978). The foregoing notwithstanding, any evidence that the accused was threatened, tricked or cajoled into a waiver will show that he did not voluntarily waive his privilege. *Miranda v. Arizona*, supra. *Miranda* further points out that a valid waiver will not be presumed simply from the silence of the accused after warnings are given or from the fact that a confession was eventually obtained. The opinion emphasizes, it should be noted, that *Miranda* does not affect volunteered statements (as contrasted to statements obtained during custodial interrogation). Volunteered statements are not barred by the Fifth Amendment privilege against self-incrimination. Thus, when an accused initiates or reinitiates the conversation, his statements are admissible. *United States v. Rieves*, 584 F.2d 740 (5th Cir. 1978).

The Circuit Courts of Appeal split as to whether a suspect in a criminal investigation could waive his right to counsel after initially making known his desire to have the assistance of counsel. The "per se" rule was that, in such a case, no waiver could be effective until after the accused had consulted with counsel. The Ninth Circuit's opinions lacked consistency until the issue was considered en banc in the case of *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (1978). There, the accused had been ambiguous as to his desire to consult with an attorney. The interrogating Drug Enforcement Administration officer asked, after giving the Miranda warnings, if the defendant wanted to talk. The defendant answered: "Okay, okay, but with an attorney." The DEA officer then asked if the defendant wanted. . ."to talk to me now without any attorney?" The answer was, "That's fine." The Court eventually held that the defendant had waived his prior request for the assistance of counsel.

Its discussion of various sub-issues is informative and interesting. First, the burden is greater when the Government attempts to show a waiver after the right to counsel has been asserted, as contrasted to when the Government attempts to show a waiver of the right to remain silent.

The Rodriguez Court then rejected the "per se" rule, thereby holding that an accused could knowingly, intelligently and voluntarily waive his previously asserted right to consult with counsel, without first having talked to an attorney. It was felt that the contrary result would imprison a man in his privileges and create absurd situations, so that Miranda should more realistically be applied with flexibility and realism.

The opinion then quotes from *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938) and *Brewer v. Williams*, 430 U. S. 387, 404 (1977) that:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." 569 F.2d, at 488.

Rodriguez notes that all communication between the officer and the defendant is not barred after assertion of the right to counsel. The officer may inform the defendant of circumstances which might contribute to an intelligent exercise of his judgment.

Six judges concurred wholly with the Rodriguez majority opinion, whereas two dissented and three others concurred in part and dissented in part.

Getting away from the Rodriguez case, and discussing waiver of Constitutional rights (such as the right to counsel), the cardinal rule is that courts should indulge in every rea-

sonable presumption against waiver. *Brewer v. Williams*, supra; *Brookhart v. Janis*, 384 U. S. 1 (1966); *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979).

The defendant's mental and physical state are critical factors in determining waiver. *Pierce v. Cardwell*, supra. The same case declares that intoxication may render a defendant incapable of voluntary, knowing and intelligent waiver.

Footnote 5 of *United States v. Washington*, 431 U.S. 181 (1977) is to a statement in the body of the opinion that, unless the record reveals some compulsion, a defendant's self-incriminating statements are not in conflict with any constitutional guarantees and are, in fact, inherently desirable. The footnote reads as follows, at page 187:

> "In *Miranda*, the Court saw as inherently coercive any police custodial interrogation conducted by isolating the suspect with police officers; therefore, the Court established a *per se* rule that all incriminating statements made during such interrogation are barred as 'compelled.' All *Miranda's* safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody." (citations omitted).

What the case holds, however, is that the giving of the comprehensive Miranda warnings dissipates any element of compulsion to self-incriminate.

The mere fact that a defendant answers questions put to him after requesting an attorney will not support a presumption that he has waived that right. *Pierce v. Cardwell*, 572 F.2d 1339 (9th Cir. 1978). In fact, once an accused has expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without

counsel's presence may properly be viewed with skepticism. *Brewer v. Williams*, 430 U. S. 387 (1977).

On the other hand, once a suspect has agreed to waive his right to counsel and to cooperate with government agents, it is not surprising that he may later develop doubts. Such doubts should not automatically bring to a halt further investigatory endeavors. *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978).

A suspect may, if he chooses, selectively waive his Fifth Amendment rights by indicating he will respond to some questions, but not to others. *United States v. Lorenzo*, 570 F.2d 294 (9th Cir. 1978).

A continued willingness to respond to questions tends to contradict a claim that the accused had revoked his earlier waiver. See *United States v. Ford*, 563 F.2d 1366 (9th Cir. 1977), cert. den. 434 U.S. 1021.

Although *Miranda* requires law enforcement agents to cease all interrogation of the accused as to his guilt or innocence immediately upon his request for the assistance of counsel, neither immediate access to an attorney nor the immediate furnishing of an attorney is required. *United States v. Evans*, 575 F.2d 1286 (9th Cir. 1978), cert. den. 99 S.Ct. 165; *United States v. Rieves*, 584 F.2d 740 (5th Cir. 1978). In *Evans* the regular screening procedure for all persons seeking to enter a military base without a pass was followed, taking between ten and twenty minutes of time. In *Rieves* it is stated that making an attorney available when the defendant arrives at jail satisfies *Miranda*. The presence of substitute counsel may suffice when the notification and presence of the accused's own counsel would result in prejudicial delay. *United States v. Wade*, 388 U.S. 218 (1967).

A lawyer is uniquely able to protect the accused from self-incrimination once the later becomes enmeshed in the

adversarial process. Counsel's presence during interrogation is indispensable for that reason, as well as to guard against overreaching by the police and to assure accurate transcription of any statements actually made. *Fare v. Michael C.*, 99 S.Ct. 2560 (1979). It follows that where interrogation follows hard on the heels of a demand for counsel, the defendant's right to have questioning cease has been violated. *United States v. Nixon*, 571 F.2d 1121 (9th Cir. 1978). When the police do stop interrogation, as required, any admissions that later come at the initiative of the accused are subject to the traditional analysis for voluntariness. *Nash v. Estelle*, 597 F.2d 513 Cir. 1979).

The mere threat by the officer to obtain a search warrant does not constitute coercion. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978).

Advice from the police to the accused intended only to contribute to his fair evaluation of his situation and to aid in his decision as to consulting with counsel is permissible. *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978). There is a distinction between questioning a suspect and presenting evidence to him; the police are allowed to present incriminating evidence to the suspect even after a request for an attorney has been made. *Pierce v. Cardwell*, 572 F.2d 1339 (9th Cir. 1978). The Government agent's promise to make known to the Court any cooperation on the defendant's part is neither interrogation nor coercion. *United States v. Rieves*, supra.

Where a *Miranda* rule has been violated, evidence thereby obtained is inadmissible in the prosecution's case in chief. Nevertheless, such evidence may be used for impeachment purposes. Were it otherwise, the protection of constitutional rights would encourage perjury by allowing the defendant to testify falsely without fear of impeachment by statements he had previously made. *Oregon v. Hass*, 420 U.S. 714

(1975); *Harris v. New York*, 401 U.S. 222 (1971). However, the right of the prosecution to use such statements is denied when they were involuntary or coerced. *Oregon v. Hass*, supra. Whether the officer's conduct amounts to an abuse is determined by the traditional standards for evaluating voluntariness and trustworthiness. Id. The utilization of involuntary or coerced statements would amount to a denial of due process of law. *New Jersey v. Portash*, 99 S.Ct. 1292 (1979).

The Court finds that Tavelman not only consented to the search of his suite, bu' actually assisted in turning over to the agents the various items of evidence they seized.

Further, the Court finds that what Tavelman told the agents was disclosed voluntarily, in conversation initiated by him. His statements were not made during custodial interrogation. Although he originally decided to exercise his Miranda right to consult with an attorney, his subsequent acts reflect a knowing, intelligent and voluntary waiver of that right. Apparently, he had decided to try to make the best of a bad situation by following the course of cooperation with the arresting officers.

Therefore, the Court hereby orders that Tavelman's Motion for the Return of Seized Property and the Suppression of Evidence be denied in its entirety.

DATED: December 12. 1979.

/s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

APPENDIX D.

Order of the Trial Court Rendered January 10, 1980.

In the United States District Court for the District of Nevada.

United States of America, Plaintiff, vs. Jack Wilbur Tavelman, Steven Job and Sheldon Scott Silverman, Defendants. CR-R-79-39-ECR.

Filed: January 10, 1980.

Defendants Jack Wilbur Tavelman and Steven Job have filed a motion in limine for a determination of the voluntariness of all confessions and assertive conduct of guilt, pursuant to 18 U.S.C. Sec. 3501.

In the supporting Points and Authorities, at page 4, lines 27-29, the movants state: "TAVELMAN's statements were made after arrest in his room, and JOB's in the police station after arrest."

As to defendant Tavelman, a Motion for the Return of Seized Property and the Suppression of Evidence was filed on his behalf on October 2, 1979. It asked, inter alia, his observations and statements be suppressed. A hearing was held on November 19 and 20, 1979, and an Order entered on December 12, 1979, denying the Motion in its entirety. Said Order found that any statements made by him in his room, after arrest, were made voluntarily and not during custodial interrogation. Thus, the instant motion in limine has already been decided on the merits adversely to defendant Tavelman as to any statements or assertive conduct in his room.

As to defendant Job, the aforementioned Order of December 12, 1979, did not deal with any statements made in a police station after arrest.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Defendant Tavelman's motion is denied as to any statements or assertive conduct of guilt in his hotel room after his arrest.

Defendant Job's motion is granted, and the Clerk of Court shall set a time for hearing the same, either prior to the trial of this action or outside the hearing of the jury if trial has commenced; and

3. To the extent defendant Tavelman's motion comprehends any statements or assertive conduct of guilt outside his hotel room and after his arrest, the same shall be heard simultaneously with the hearing on defendant Job's motion.

DATED: January 10, 1980.

/s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE.

APPENDIX E.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX F.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G.

United States Code, Title 18, Section 1952.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102 (b) of the Controlled Substances Act [21 USC §802 (b)], or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigation of violation under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

APPENDIX H.

United States Code, Title 18, Section 3501 (a) & (b).

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (10 the time elapsing between the arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

APPENDIX I.

United States Code, Title 21, Section 846.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 19 1982
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Nos. 81-846 and 81-944

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK WILBUR TAVELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

STEVEN JOB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITON

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QUESTIONS PRESENTED

1. Whether the involvement of government agents in the criminal scheme bars petitioners' convictions (Nos. 81-846 and 81-944).

2. Whether petitioner Tavelman's pre-arrest or post-arrest statements were improperly admitted into evidence.

3. Whether there was probable cause for petitioner Tavelman's arrest.

4. Whether petitioner Tavelman's consent to a search of a bathroom laboratory in his hotel room was voluntary.

5. Whether impossibility can serve as a defense to a charge of conspiracy to possess a controlled substance (No. 81-944).

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-846

JACK WILBUR TAVELMAN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15)[1] is reported at 650 F. 2d 1133. The district court's orders of December 12, 1979, and January 10, 1980 (Pet. App. 17-28) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1981, and amended on September 25, 1981. Petitions for

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[1] "Pet. App." refers to the appendix to the petition in No. 81-846.

rehearing were denied on September 25, 1981 (Pet. App. 15-16). The petition for a writ of certiorari in No. 81-846 was filed on November 3, 1981, and the petition for a writ of certiorari in No. 81-944 was filed on November 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count I), and interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3) (Count II). Tavelman was sentenced to five years' imprisonment on Count I, and sentenced to a concurrent term of three years' imprisonment and fined $5,000 on Count II. Job was sentenced to eight years' imprisonment on Count I and four years' imprisonment on Count II, to run consecutively. Both petitioners also were sentenced to special parole terms of three years, which were vacated by the court of appeals in accordance with *Bifulco* v. *United States*, 447 U.S. 381 (1980). In all other respects, the court of appeals affirmed (Pet. App. 1-15).

The evidence adduced at trial, which is summarized in the court of appeals' opinion (Pet. App. 1-4), showed that Bruce Baron, then an inmate of the Douglas County, Nevada jail, contacted DEA Agent Dennis Cameron in Reno, Nevada, and offered to assist the agency in apprehending persons involved in the distribution of illicit drugs. Cameron accepted Baron's offer. After Baron informed Cameron that he had been approached by Mark Meekins, a middleman who was looking for a source of large quantities of cocaine, Cameron, in order to enhance Baron's image as a cocaine dealer, supplied Baron with photographs showing Baron carrying large bags filled with what appeared to be

cocaine. Baron then met with Meekins and told him that he knew of an available supply of cocaine.

In July 1979, Meekins introduced Baron to Shelley Silverman (Pet. App. 1-2; Tr. 106-109, 281-285). Over the next few days, Silverman, who also was a middleman, made a number of telephone calls to petitioner Job to see if Job was interested in purchasing cocaine from Baron in Reno, where Baron's "source" was located.[2] Baron later met with Job in Job's North Hollywood, California house. Job expressed interest in purchasing cocaine from Baron after he had disposed of a kilo of cocaine already in his possession, but only if Baron's cocaine was of 91% or better purity. The parties agreed that if Baron could acquire cocaine of that quality, Job would pay $27,000 per pound (Pet. App. 2; Tr. 111-116, 285).

Baron returned to Reno and negotiated the sale with Job in taped telephone conversations that took place over the next several days. Job explained that his friend Jack, an accountant, was going to test Baron's cocaine and would put up part of the purchase money (Pet. App. 2; Tr. 120-123, 287-290).

Baron and Job agreed that they and Job's partner would meet in Reno on July 20, 1979 (Tr. 125-126, 293). Agent Cameron gave Baron two bags of procaine, a non-narcotic

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[2]At trial Silverman testified that this was not the first cocaine transaction he had had with Job. One month earlier, a man known as "Tea Bags" had offered to sell Silverman one pound of cocaine. Silverman called Job, who expressed a willingness to buy the cocaine if he could test a sample of the drug first. After doing so, Job told Silverman that he had a partner and that he needed time to get the purchase money. A few days later, Silverman returned to Job's house with "Tea Bags," and Job tested the cocaine again. Job then spoke with someone on the telephone, and, a few minutes later, petitioner Tavelman arrived. Tavelman and Job went into a back bedroom, from which Job emerged with between $27,000 and $29,000 in cash, which he paid "Tea Bags" (Pet. App. 2 n.1; Tr. 70-78).

substance that looks like cocaine, and Baron and Cameron, who posed as Baron's compatriot, subsequently met Job in a Reno hotel (Tr. 293, 295). After Baron permitted Job to see the procaine, Job took Baron to his room so that Baron could see the $24,000 in cash, which was one half of the purchase price. Job explained that his friend had the other half of the purchase money and a cocaine testing laboratory set up in the bathroom of his room on the floor above. After seeing the cash, Baron retrieved the procaine from Cameron, who had been waiting in the hotel bar. The three men, along with another DEA agent, then got on an elevator to go to Tavelman's room to test the cocaine. When Job got out of the elevator on the 24th floor, he realized that he was being followed. Agent Cameron then arrested Job, and Job asked the agents to take him back to his room. Before doing so, the agents seized a pouch of money from Job. In Job's room, Cameron seized an airline ticket that fell from Job's coat and approximately $1,000 in cash (Pet. App. 2-3; Tr. 293-296, 302-303, 306-308).

Cameron then consulted with hotel management in an attempt to locate Job's partner. Cameron concluded that Tavelman was likely to be located in Room 2417, and he proceeded to that room. He knocked on the door, identified himself to Tavelman as a DEA agent investigating a narcotics offense and asked to be admitted. Petitioner Tavelman admitted Cameron and, at Cameron's request, also admitted two agents and one hotel security officer (Pet. App. 3; Tr. 312-313; H. Tr. 132-137).[3]

During the conversation that followed, Tavelman admitted that he was an accountant, that he had registered under a false name, that he had $22,000 in cash in the room and that he had flown from Los Angeles on what the agents

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[3]No agent had his gun drawn when he entered the room (H. Tr. 132, 134, 136) ("H. Tr." refers to the suppression hearing held on November 19 and 20, 1979).

knew was the same flight Job had taken (Pet. App. 3; Tr. 312-317; H. Tr. 138-139). Cameron explained that they were looking for an individual who had a cocaine testing laboratory set up in the bathroom and asked if he could search Tavelman's bathroom. Tavelman declined and said that he wanted to consult with an attorney. Agent Cameron then placed him under arrest and advised him of his *Miranda* rights (Pet. App. 3; Tr. 314-317; H. Tr. 138-140, 144).

After Tavelman had unsuccessfully attempted to contact his attorney, he asked Cameron whether he could "help himself" by cooperating. Cameron replied that the only answer he could give Tavelman was that anything he did to help would be made known to the United States Attorney. Tavelman again inquired whether it would be beneficial to him if he consented to a search of the bathroom, to which Cameron responded that if he found what he expected to find a search would not be in Tavelman's best interests. Cameron advised Tavelman that he was going to attempt to obtain a search warrant, a process that would take several hours, and that if Tavelman consented to a search it would be a concession only to Cameron, to save him some time. Tavelman then stated that since he was being treated like a gentleman, he would show Cameron what he was looking for. Tavelman led Cameron to the bathroom, opened the door, and showed him a cocaine testing laboratory set up inside (Pet. App. 3-4; Tr. 317-319; H. Tr. 145-147).

While other agents were examining the laboratory, Tavelman explained to Cameron how he was going to test the cocaine. Shortly thereafter, Tavelman gave Cameron the cocaine and $22,000 that he had with him in the hotel room. Tavelman told Cameron that he had intended to use the cocaine to test the purity of Baron's cocaine (Pet. App. 4; H. Tr. 148; Tr. 326-327).

ARGUMENT

1. Both petitioners argue (81-846 Pet. 7-10; 81-944 Pet. 10-21) that, even if they were predisposed to commit the offenses of which they were convicted, the conduct of the government agents in this case was so "outrageous" as to require dismissal of the prosecutions on due process grounds. Specifically, petitioners contend that the government agents "created" the crime and then induced them "to enter the criminal scenario conceptualized by the agents" (81-846 Pet. 10). As the court of appeals correctly concluded (Pet. App. 11), however, the conduct complained of was neither "outrageous" nor "grossly shocking." To the contrary, it was entirely proper law enforcement activity.

In the first place, petitioners mischaracterize the origin of the scheme. Contrary to petitioners' assertion, government agents did not approach Job and offer to sell him drugs. Rather, the evidence shows (see pages 2-3, *supra*) that Silverman, a middleman, approached an informant, Baron, and expressed interest in locating a source to supply large quantities of cocaine. The DEA agents then followed the middleman's lead by permitting the informant to offer purported cocaine for sale, so that they could learn the identity of the ultimate buyer. There was nothing improper in such conduct. See *United States* v. *Russell*, 411 U.S. 423 (1973).

Job's claim (Pet. 19) that he was lured to Nevada by telephone calls and promises of women, gambling, fun and entertainment similarly is unpersuasive. The evidence at trial showed that this was not the first narcotics transaction that Silverman had set up for Job and his "partner," Tavelman (see note 2, *supra*). Moreover, the only reluctance to purchase the cocaine that Job exhibited was based on his desire first to sell a kilo of cocaine already in his possession (see page 3, *supra*). It is thus apparent that both petitioners

were dealing in cocaine before Baron ever came into the picture.[4]

2. Tavelman contends (Pet. 10-15) that the district court should have suppressed his pre-arrest statements to Cameron because they were the result of "custodial interrogation" conducted without a reading of *Miranda* rights and that any statements he made after his arrest also should have been suppressed because, he claims, Cameron continued questioning him despite his request to speak with his attorney.

Prior to trial, Tavelman moved to suppress all evidence found and statements made in his hotel room on the ground that they were the fruit of an unlawful arrest and search. At a suppression hearing held on November 19-20, 1979,

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[4]Job's reliance (Pet. 16-18, 21) on an alleged conflict between, on the one hand, the decision below and, on the other hand, *United States* v. *Borum*, 584 F. 2d 424 (D.C. Cir. 1978), and *United States* v. *Twigg*, 588 F. 2d 373 (3d Cir. 1978), is misplaced. In *Borum*, in which the District of Columbia Circuit reversed the defendant's conviction of offenses arising out of his illegal possession of a firearm, the court of appeals had found that there was "sufficient evidence in the record for a jury to find both 'inducement' by government agents *and lack of predisposition* on the part of appellant Borum" (584 F. 2d at 428; emphasis added), and had rejected the government's suggestion that it "transfer" the defendant's undisputed predisposition to fence stolen merchandise to the firearms offenses for which the defendant was convicted (*id.* at 429). Nor does *United States* v. *Twigg*, *supra*, have any application to the facts of this case. In *Twigg*, the court of appeals reversed convictions for the manufacture of, and conspiracy to manufacture, a controlled substance on the ground that extensive police involvement in the crime violated due process. Even assuming that such a defense was called for in *Twigg* by the extent of the police involvement there—including the facts that a government informant "was completely in charge of the entire laboratory" in which the manufacturing occurred (588 F. 2d at 376) and that only the informant, but neither of the defendants, knew how to manufacture the controlled substance (*id.* at 381), the comparatively minor role played by the agents in this case would not warrant the defense here.

Tavelman argued, *inter alia*, that he was arrested as soon as the agents entered his hotel room, that his arrest was not supported by probable cause, that his Fifth Amendment rights were violated when agents obtained post-arrest statements from him in the absence of any valid waiver of his *Miranda* rights, and that he did not consent to the search of his hotel bathroom (H. Tr. 299, 302; see Pet. 5).

The district court denied Tavelman's motion on December 12, 1979 (Pet. App. 17-26). The court determined that Tavelman initially had invited Agent Cameron and the other agents into his hotel suite (*id.* at 17), and that subsequently Tavelman "not only consented to the search of his suite, but actually assisted in turning over to the agents the various items of evidence they seized" (*id.* at 26). The court further found that any statements Tavelman made after his arrest were voluntary. In a subsequent order dated January 10, 1980, the court reiterated (*id.* at 27) that "any statements made by [Tavelman] in his room, after arrest, were made voluntarily and not during custodial interrogation."[5] The

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[5]The January 10, 1980 order was entered in response to Tavelman's motion in limine for a determination of the voluntariness of all statements made by him after his arrest in his hotel room (Pet. App. 27). In denying the motion in limine, the district court noted (*ibid.*) that it already had disposed of Tavelman's claims in its prior order (*id.* at 17-26) on the basis of the November 19-20, 1979, suppression hearing. Tavelman's claim (Pet. 15 n.1) that he was denied a hearing on the voluntariness of his post-arrest statements is additionally foreclosed by his trial counsel's negative response to the district court's inquiry whether "any other facts * * * might come out if we held an evidentiary hearing other than what we have dealt with here" (Tr. 9).

Apart from the statements whose admission Tavelman complains of here, the district court admonished the jury to disregard testimony concerning three other statements allegedly made by the petitioners. First, on cross-examination, Agent Cameron testified that Tavelman had told him that "they were going to use [the $22,000 found in Tavelman's hotel room] to buy the coke" (Tr. 371). The district court previously had ruled this statement inadmissible in the government's case-

court of appeals affirmed (Pet. App. 1-15), specifically holding that Tavelman had consented to the agents' initial entry into his hotel room and to their subsequent search of it (*id.* at 9) and that "the district court's determination that Tavelman was not in custody prior to his formal arrest was not clearly erroneous" (*id.* at 15).

a. In *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966) (footnote omitted), this Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." The *Miranda* requirements do not apply to routine on-the-scene questioning about a possible crime. *Miranda* v. *Arizona, supra*, 384 U.S. at 477. Rather, *Miranda* warnings are required only where a suspect's freedom to leave is restricted. See *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977).

The facts of record in this case clearly demonstrate that Tavelman was not "in custody" when the agents, *with his permission*, entered his hotel room. At that time, the agents had not determined or concluded that Tavelman was Job's partner. When Cameron entered Tavelman's hotel room, Cameron intended only to investigate the possibility that Tavelman was involved in the attempt to purchase cocaine. Cameron himself testified (H. Tr. 137-138) that he did not consider Tavelman to be "under arrest" prior to his formal arrest because Cameron "hadn't asked [Tavelman] enough

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in-chief, and after it came out on cross-examination the court directed the jury to disregard it (Tr. 452). Second, when the petitioners accidentally met at the DEA Office following their arrest, Job remarked, "Jack, I se they got you, too. I just want you to know that they didn't get you t gh me." Tavelman then asked Cameron: "How did you get me?" (Pet. App. 4; H. Tr. 152; Tr. 335). Prior to trial, the district court had ruled (correctly, in our view) that these spontaneous statements were admissible (Tr. 22), but subsequently it ordered them stricken from the record as well (Tr. 452).

to have probable cause in [his] own mind to believe [Tavelman] was Jack the accountant." Neither does the record reflect that petitioner believed or reasonably should have believed that he was in custody. Tavelman was questioned in his own hotel room, to which he voluntarily had admitted the agents, and at no time was he told he was not free to leave. Indeed, on direct examination, Tavelman testified that whether he was free to leave his hotel room had never occurred to him; he had never thought about it (H. Tr. 203). Accordingly, the present case is controlled not by *Orozco* v. *Texas*, 394 U.S. 324 (1969), on which Tavelman relies (Pet. 11), but rather by *Beckwith* v. *United States*, 425 U.S. 341 (1976), in which the Court held that Internal Revenue agents engaged in a criminal tax investigation were not required to give *Miranda* warnings to a suspect whom they questioned in a private residence in which the defendant occasionally stayed and into which the officers had been invited (*id.* at 342).

b. Tavelman further argues (Pet. 13-14) that any statements made after his arrest also were obtained in violation of his *Miranda* rights. The district court correctly ruled (Pet. App. 26), however, that petitioner's post-arrest statements to Agent Cameron were not the product of interrogation, but rather were made voluntarily during a conversation initiated by Tavelman, after he had waived his right to counsel.

Although interrogation must cease after a suspect has elected to exercise his right to counsel, subsequent volunteered statements are not barred by *Miranda's* prophylactic protections of the Fifth Amendment privilege against compelled self-incrimination. *Edwards* v. *Arizona*, No. 79-5269 (May 18, 1981), slip op. 8-9; *Miranda* v. *Arizona*, *supra*, 384 U.S. at 478. Statements made by a defendant upon his own initiation of a conversation with law enforcement personnel are admissible. See *United States* v.

Rieves, 584 F. 2d 740, 745-746 (5th Cir. 1978). Advice from police intended only to contribute to a suspect's evaluation of his situation does not constitute interrogation even if the suspect has asked for a lawyer. *United States* v. *Rose*, 570 F. 2d 1358, 1361 (9th Cir. 1978). Likewise, an agent's promise to make known to authorities any cooperation by the defendant does not constitute interrogation. *United States* v. *Rieves, supra*, 584 F. 2d at 745.

The record here clearly demonstrates that the statements Tavelman made following his arrest were not in response to questions by Agent Cameron, but rather were the result of Tavelman's own initiative. Thus, after Tavelman failed to contact his attorney, he asked Agent Cameron if cooperation would aid his situation (Pet. App. 18). Cameron replied only that Tavelman's cooperation would be made known to the United States Attorney (*ibid.*). When Tavelman persisted and asked if it would be beneficial for him to consent to a search of his bathroom, Cameron responded that if he found what he expected to find, such a consent would not be in Tavelman's best interests (H. Tr. 146). Nonetheless, Tavelman proceeded to show the agents the bathroom laboratory and other incriminating evidence (Pet. App. 18).

Accordingly, it is clear that, contrary to Tavelman's contention (Pet. 13-14), the agents "scrupulously honor[ed]" his request for an attorney. When Tavelman was unable to contact his lawyer, the agents did not attempt to interrogate him. Instead, they merely responded to *his* questions, which was entirely proper. Cf. *Edwards* v. *Arizona, supra*, slip op. 8-9; *Rhode Island* v. *Innis*, 446 U.S. 291, 300-301 (1980). As the district court found (Pet. App. 26), Tavelman voluntarily and knowingly chose to waive his right to counsel, thus rendering his subsequent responses to Cameron's questions conerning the operation of the laboratory and similar matters also admissible.

3. Tavelman next asserts (Pet. 15-16) that the agents lacked probable cause to arrest him. This contention, however, depends on Tavelman's further assertion (*ibid.*) that he was, in fact, arrested at the moment that the agents entered his hotel room.

As we have shown above (pages 9-10, *supra*), Tavelman was neither under arrest nor in custody at the time Agent Cameron entered his hotel suite. Rather, at that point, Cameron was merely investigating the possibility that Tavelman was involved in the aborted effort to purchase cocaine. Prior to his conversation with Tavelman, Cameron knew only that an accountant named "Jack" had come to Reno on the same flight as Job, was staying in the same hotel as Job, and was going to test the cocaine and pay half the purchase price. In addition, immediately before Cameron arrested Job, Job and Baron had gotten off the hotel elevator on the 24th floor on their way to "Jack's" room to test the cocaine. Hotel security also had determined that the occupant of Room 2417 met "Jack's" description (Pet. App. 3). On cross-examination, Cameron described the situation as follows (Tr. 370): "My feeling at the time is if he had shut the door in our face and told us he didn't want to talk about it, that would have been the end of it."

It was only after Tavelman invited the agents into his room that Cameron learned that the occupant of Room 2417 was Jack Wilbur Tavelman, that he had registered at the hotel under an alias, that he was an accountant, that he had flown to Reno from Los Angeles on the same flight as Job, indeed, in the seat next to Job's, and that he was carrying a large sum of money (Pet. App. 3). Together with his previous knowledge, this additional information furnished Cameron ample probable cause to believe that Tavelman was Job's partner and to arrest him at that time.

In any event, regardless of whether the agents believed they had probable cause to arrest Tavelman at the time he admitted them into his hotel room, the entry was not an arrest. Tavelman was not told he was under arrest, nor did the agents act in a manner that could reasonably be construed by Tavelman to place him under arrest. Instead, they accurately identified themselves and their purpose and were voluntarily admitted to the room.

4. Tavelman next contends (Pet. 17-18) that, even if he had been lawfully arrested, he did not consent to a search of the bathroom laboratory. Both courts below, however, rejected this fact-based contention, and there is no reason for further review of it. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, it is without merit.

Tavelman's claim (Pet. 17-18) that he was subjected to continued questioning accompanied by deceitful promises and threats to get a warrant is belied by the facts of record. As we have shown, after petitioner's arrest, Agent Cameron terminated the questioning. Tavelman himself, however, asked whether it would be in his best interests to consent to a search of the bathroom. Cameron made it clear that if he found what he expected to find in the bathroom a search would not be in petitioner's best interests. Tavelman nonetheless replied, "you have been a gentleman with me so far, and I have tried to be cooperative. I may as well be cooperative all the way. * * * What you're looking for is in the bathroom" (Tr. 319). Tavelman then took Cameron to the bathroom and showed him the laboratory (*ibid.*). On these facts, there is no reason to doubt the lower courts' conclusion that Tavelman voluntarily consented to a search of the bathroom. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

5. Finally, Job attempts (Pet. 23) to characterize the conspiracy charge as a "conspiracy to attempt to buy cocaine" in order to pave the way for his "impossibility" argument (Pet. 22-28). Petitioners were not charged under the attempt prong of the statute, however, but rather were indicted for conspiracy to possess a controlled substance with intent to distribute it, in violation of 21 U.S.C. 846. It is well settled that impossibility, whether "factual" or "legal," is not a defense to a charge of conspiracy. See W. LaFave & A. Scott, *Criminal Law* 474-476 (1972); *United States* v. *Bobo*, 586 F. 2d 355, 371 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); *United States* v. *Sanford*, 547 F. 2d 1085, 1091-1092 (9th Cir. 1976); *United States* v. *Kellerman*, 431 F. 2d 319, 323 (2d Cir.), cert. denied, 400 U.S. 957 (1970).

The essential element of the crime of conspiracy is the *agreement* to join an illegal venture; whether the conspirators suceed in their criminal endeavor is irrelevant. *United States* v. *Feola*, 420 U.S. 671, 694 (1975); *United States* v. *Marx*, 635 F. 2d 436, 439 (5th Cir. 1981); *United States* v. *Shoup*, 608 F. 2d 950, 956, 963 (3d Cir. 1979); *United States* v. *Sanford, supra*, 547 F. 2d at 1091-1092; *United States* v. *Kellerman, supra*, 431 F. 2d at 323. Accordingly, in a prosecution for conspiracy to possess a controlled substance with intent to distribute it, it is immaterial if, at the final stage of their endeavor, the conspirators fail to secure any contraband substance or, indeed, any substance at all. It is sufficient that they intended to possess contraband and agreed to participate in a criminal scheme with that object in mind. See *United States* v. *Marx, supra*, 635 F. 2d at 439; *United States* v. *Bobo, supra*, 586 F. 2d at 371; *United States* v. *Rueter*, 536 F. 2d 296, 298 (9th Cir. 1976).[6]

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[6]Under the conspiracy statute involved here, 21 U.S.C. 846, the government is not required to prove an overt act in furtherance of the conspiracy (*United States* v. *Marx, supra*, 635 F. 2d at 439), although, of course, petitioners undertook numerous overt acts in furtherance of their conspiracy.

In the present case, the evidence overwhelmingly shows that the petitioners agreed to travel to Reno together for the express purpose of purchasing a substantial quantity of what they believed to be cocaine. The crime of conspiracy was complete once they agreed to participate in this scheme (see note 6, *supra*), and is further evidenced by the steps they took toward their goal. Because the government's proof thus satisfied the requirements of conspiracy law, the nature of the substance that was offered for sale is irrelevant. See, *e.g., United States* v. *Bobo, supra*, 586 F. 2d at 371.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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